Supreme Court, U.S.
FILED
JAN 10 1994
OFFICE OF THE CLERK

No. 93-733

In The

Supreme Court of the United States

October Term, 1993

JOHN POZSGAI and GIZELLA POZSGAI,

Petitioners,

v.

UNITED STATES OF AMERICA,
MERCER WRECKING & RECYCLING CORPORATION,
J. VINCH & SONS, INC.,

Respondents.

On Petition For *Writ* Of *Certiorari*
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONERS

PAUL M. SILBY
WILLIAM PERRY PENDLEY*
(*Counsel of Record)
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Counsel for Amici Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

IDENTITIES AND INTERESTS OF *AMICI CURIAE* ... 2

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE... 3

SUMMARY OF THE ARGUMENT 3

REASONS FOR GRANTING THE *WRIT*..... 4

I. INTRODUCTION: SECTION 404: THE GOVERNMENT'S PENCHANT FOR OVERREGULATION..... 4

A. THE REGULATORY HYDRA: REGULATING DRY LAND 8

1. THE CORPS' REGULATIONS PURPORT TO REGULATE ONLY TRULY AQUATIC AREAS 8

2. NATIONWIDE REACTION TO THE CORPS/EPA'S DRY "LAND GRAB"... 9

B. THE PENCHANT FOR OVERREGULATION SIGNIFICANTLY IMPACTS THE REGULATED COMMUNITY 11

II. IN ENACTING THE CLEAN WATER ACT, CONGRESS DID NOT INTEND TO INCLUDE ALL AREAS THAT MEET REGULATORY WETLANDS DEFINITION WITHOUT REGARD TO THE EFFECT OF THEIR USE ON INTERSTATE COMMERCE 12

A. THE CLEAN WATER ACT DOES NOT REACH TO THE CONSTITUTIONAL LIMIT OF THE CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE..... 13

TABLE OF CONTENTS – Continued

Page

B. THE "EFFECT ON COMMERCE TEST" IS AN ESSENTIAL ELEMENT IN DETERMINING WHETHER AN ACTIVITY COMES WITHIN THE COMMERCE CLAUSE..... 14

C. CONGRESS NEVER EXPLICITLY REQUIRED THE REGULATION OF ALL ACTIVITIES THAT IN ANY WAY AFFECT ANY AREAS CONTAINING WETLANDS MEETING THE CORPS' AND EPA'S REGULATORY DEFINITION..... 16

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

1902 Atlantic, Ltd. v. Hudson, 574 F. Supp. 1381 (E.D. Va. 1983) 5, 6

Construction Aggregate Transport, Inc. v. Fla. Rock Industries, Inc., 710 F.2d 752 (11th Cir. 1983) 13

Del Rio Distributing Co., Inc. v. Adolph Coors Co., 589 F.2d 176 (5th Cir. 1979) 14

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 13

Harrison v. P.P.G., 446 U.S. 578 (1980) 8

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 17

Hodel v. Virginia Surface Mining and Reclamation Assn., 452 U.S. 264 (1981) 13, 15, 18

Katzenbach v. McClung, 379 U.S. 294 (1964) 17

McClain v. Real Estate Board of New Orleans, Ins., 444 U.S. 232 (1980) 14

Perez v. United States, 402 U.S. 146 (1971) 17, 18

United States v. Darby, 312 U.S. 100 (1941) 16, 17, 18

United States v. Larkins, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1131 (1989) 6, 7

United States v. Ocie Mills, 817 F. Supp. 1546 (N.D. Fla. 1993) 5

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 7, 13, 15, 19

United States v. Women's Sportswear Assn., 336 U.S. 460 (1949) 15

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION

Article I, § 8, Cl. 3 13

STATUTES AND REGULATIONS

18 U.S.C. § 891 17

33 U.S.C. § 403 4

33 U.S.C. § 1251 *et seq* 3, 19

33 U.S.C. § 1251(a) 4

33 U.S.C. § 1311 4

33 U.S.C. § 1319 11

33 U.S.C. § 1344 4

33 U.S.C. § 1362(6) 11

42 U.S.C. § 2000a(b)(1) 14

42 U.S.C. § 2000a(b)(4) 14

42 U.S.C. § 2000(c) 14

33 C.F.R. § 328.3 8

33 C.F.R. § 328.3(b) 8

42 *Fed. Reg.* 37,129 (1977) 8

53 *Fed. Reg.* 8859 (1988) 7

LEGISLATION

Legislative History of the Clean Water Act of 1977, Vol. 3-4 (1978) 6

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Audubon Magazine, July (1990) 9

Farm Journal, June/July (1990) 10

EPA: "America's Wetlands: Our Vital Link Between Land and Water" (1988) 10

Thomas Jefferson, *Writings*, Vol. XIX 3

No. 93-733

In The

Supreme Court of the United States

October Term, 1993

JOHN POZSGAI and GIZELLA POZSGAI,

Petitioners,

v.

UNITED STATES OF AMERICA,
MERCER WRECKING & RECYCLING CORPORATION,
J. VINCH & SONS, INC.,

Respondents.

On Petition For *Writ* Of *Certiorari*
To The United States Court Of Appeals
For The Third Circuit

BRIEF *AMICI CURIAE* OF MOUNTAIN STATES LEGAL FOUNDATION, THE ALLIANCE FOR AMERICA, AND THE FAIRNESS TO LAND OWNERS COMMITTEE IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation ("MSLF") respectfully submits this brief *amici curiae* in support of John Pozsgai and Gizella Pozsgai, the Petitioners for *writ* of *certiorari*.[1]

[1] *Amici* have obtained the written consents of the parties. The written consents have been provided to the Clerk of the Court.

IDENTITIES AND INTERESTS OF *AMICI CURIAE*

The Alliance for America ("Alliance") is a fifty state network of nearly five hundred independent grassroots organizations, whose collective membership numbers in the millions. These groups represent a variety of vocational, cultural, and political interests including farming, grazing, forestry, commercial fishing, mining, recreation, energy, animal welfare, private property protection, local government and various community and regional organizations. The Alliance was formed in 1991, and is intent on curbing excessive governmental regulation and the violation of constitutionally protected property rights resulting in family and community despair.

The Fairness to Land Owners Committee ("FLOC") is a Maryland-based, national organization with over 13,000 members who are property owners faced with confiscatory land-use regulations involving a number of federal and state statutes. FLOC is dedicated to protecting property rights, especially the right to the prudent use of one's own land, and is active in educating the public and lawmakers about the difference between conservation and confiscation.

MSLF is a non-profit, membership public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited government and the free enterprise system. MSLF's members include businesses and individuals who live and work in nearly every state of the country. A large number of MSLF's members work in businesses involved in the utilization and development of natural resources and, as a result, are actively involved in many environmental issues.

Many of *amici*'s members are engaged in farming and ranching activities across the country. Farming and ranching have long been recognized as the backbone of this nation:

> Whenever there are in any country uncultivated lands and unemployed poor it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for men to labor and live on. . . . The small landowners are the most precious part of the state.

Thomas Jefferson, *Writings*, Vol. XIX, p. 17.

As demonstrated herein, the implications of the Pozsgai case far transcend the Pozsgai's individual situation and are indicative of problems of nationwide magnitude. This case presents serious questions of how individual rights are to be protected from governmental excesses, both in the enforcement of laws, for the ostensible protection of the environment, and the administration of justice. *Amici* believe it is vitally important for this Court to protect these individual freedoms in the face of increasing civil and criminal enforcement under the Clean Water Act ("CWA"), 33 U.S.C. § 1251 *et seq.*

Amici's interests in the outcome of this lawsuit are directly tied to their members' private property rights. *Amici* have serious concerns that the ruling of the Third Circuit does violence to precedents written by this Court which recognize the constitutional limitations of our federal government.

OPINIONS BELOW, JURISDICTION, STATUTES INVOLVED AND STATEMENT OF THE CASE

Amici hereby adopt Petitioners' statement and description of the opinions below, jurisdiction, statutes involved, and statement of the case.

SUMMARY OF THE ARGUMENT

This case presents this Court with an extremely important constitutional issue on the reach of federal jurisdiction under the Commerce Clause, which has grave consequences for thousands of private property owners

whose farms, back yards, or one-quarter acre lots are subjected to strict and overly burdensome federal land-use control under the CWA. However, the CWA is not a federal land-use statute, its purpose is to protect water quality. The Army Corps of Engineers ("Corps") and the Environmental Protection Agency ("EPA") have assumed jurisdiction under the CWA which, given their penchant for overregulation, has caused them to regulate private property without any nexus to interstate commerce.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION: SECTION 404: THE GOVERNMENT'S PENCHANT FOR OVERREGULATION

The CWA, which was known as the Federal Water Pollution Control Act at the time of its enactment in 1972, is a comprehensive effort by Congress to restore and maintain the "chemical, physical, and biological integrity of the nation's waters." 33 U.S.C. § 1251(a). However, as laudatory as these goals may be, the actual legal requirements are found in other sections of the statute.

The cornerstone of the regulatory scheme established by the CWA is Section 301, 33 U.S.C. § 1311, which prohibits the discharge of "any pollutant" into "navigable waters," except when in compliance with various sections of the CWA, including Section 404, 33 U.S.C. § 1344. Section 404 establishes a program whereby the Corps issues permits for the "discharge of dredged and fill material." The Section 404 program is somewhat of an orphaned hybrid which arose out of the combination of the historic regulation by the Corps of obstructions to navigation under the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, and the environmental concerns of the CWA.

A troublesome shortcoming of the Section 404 program is that it bears, at best, a strained relationship to the purposes of the CWA, as evidenced by both the civil and criminal enforcement actions brought against Petitioners.

The purpose of the CWA is to protect water quality, not to regulate land-use. As stated recently by Judge Vinson in a similar CWA enforcement action:

> This case presents the disturbing implications of the expansive jurisdiction which has been assumed by the United States Army Corps of Engineers under the Clean Water Act. In a reversal of terms that is worthy of *Alice In Wonderland*, the regulatory hydra which emerged from the Clean Water Act mandates in this case that a landowner who places clean fill dirt on a plot of subdivided dry *land* may be imprisoned for the statutory felony offense of "discharging pollutants into the navigable *waters* of the U.S."

United States v. Ocie Mills, 817 F. Supp. 1546, 1548 (N.D. Fla. 1993) (emphasis in original).

The substance of the CWA's jurisdictional boundaries has not been altered by Congress since 1977. Even when Congress considered the 1977 amendments to Section 404, it attempted to curb what many members of Congress perceived as "the Corps' penchant for overregulation, particularly in cases of *de minimus* environmental concern." *1902 Atlantic, Ltd. v. Hudson*, 574 F. Supp. 1381, 1397-98 (E.D. Va. 1983). The *1902 Atlantic, Ltd.* Court's quotation from a colloquy during the floor debate on the Senate bill, (S. 1952) between Senator Muskie (the Senate manager of the 1977 amendments) and Senator Bentsen, is illustrative of Congress' concern for the Corps' penchant for overregulation:

> MR. BENTSEN: Mr. President . . . Section 404 has become a symbol to many Americans of how a well-intended legislative initiative can turn into a quagmire of disruption, frustration, and bureaucratic entanglement for the ranchers, farmers, foresters, and average citizens of this country.

* * *

> Section 404 has become synonymous with Federal overregulation, overcontrol, cumbersome bureaucratic procedures, and a general lack of realism. . . .
>
> * * *
>
> During Senate consideration on the conference report on the Clean Water Act of 1977, Senator Muskie, who also was one of the Senate conferees, stated that the statements made during Senate debate, such as the statements above, adequately reflect the legislative intent with respect to Section 404.

1902 Atlantic, Ltd., 574 F. Supp. at 1398, n.16 (quoting Legislative History of the Clean Water Act of 1977, Vol. 3-4, pp. 470, 901-902 (1978)) (emphasis added).

Unfortunately, despite the concerns expressed in 1977, by Senators Bentsen and Muskie, things have become worse – not better. The "penchant for overregulation" (by both the Corps and EPA) now victimizes farmers and landowners nationwide, including *amici*'s membership, as the Corps and EPA attempt to use the CWA to expand their "regulatory turf" out of the water, out of the swamps and marshes, straight onto dry land.

Much like Judge Vinson's discomfort with the Corps' regulatory framework, in *United States v. Larkins*, 852 F.2d 189 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1131 (1989), Circuit Judge Merritt went out of his way, *sua sponte*, to criticize the Corps' overexpansive jurisdictional approach:

> [T]he Corps has not expanded the definition of "navigable waters" to include any creek or stream or moist area. . . . "Under such a construction [as proposed by the Corps of Engineers] low lying backyards miles away from a navigable waterway would become wetlands." [citation omitted] The Corps' definition has

> apparently detached and untied the "wetlands" jurisdiction of the Corps from any concept of "open waters" or navigable waters. A farmer's low lying farmland or a homeowner's low lying backyard – adjacent to a small stream or creek many miles from any navigable waterway – has apparently been converted into government property no longer subject to control or improvement by the owner without government permission. A "wetlands" has apparently been read to include simply "moist land adjacent to a creek." The framers of the Constitution were solicitous of the rights of landowners – especially small farmers struggling for survival – not to have land appropriated by the government. They therefore adopted the provision of the Fifth Amendment of the Constitution prohibiting the taking of private property for public use without just compensation.

United States v. Larkins, 852 F.2d at 193 (Merritt, J., concurring).

Unlike the present case, *Larkins* involved land covered in part with "knee deep waters" and cypress trees, 659 F. Supp. 76, 79, containing numerous sloughs and depressions which defendants filled, 852 F.2d at 190, and which previously "tended to be covered by standing water." *Id.* at 191. Although this Court has held that a "taking" claim is no defense to a § 404 enforcement action, *see United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 127-28 (1985), as indicated by Judge Merritt in *Larkins*, it is fundamentally wrong for the government to try and seize control of its citizens' property under the pretext of enforcing an "anti-water pollution" statute. *See* Exec. Order 12630, March 15, 1988, 53 *Fed. Reg.* 8859, "Governmental Actions and Interference With Constitutionally Protected Property Rights" (directing each

agency to account for Fifth Amendment "taking" concerns in carrying out actions, *including* regulatory and permitting functions).

A. THE REGULATORY HYDRA: REGULATING DRY LAND.

1. THE CORPS' REGULATIONS PURPORT TO REGULATE ONLY TRULY AQUATIC AREAS.

The new trend (*i.e.*, regulating under § 404 as if it were a "land preservation statute," instead of an "anti-water pollution" statute), even stands in direct contradiction to the Corps and EPA's own regulations. The regulations defining "wetlands" have remained unchanged since 1977. After defining "wetlands," the regulations further clarify the definition by stating that "[w]etlands generally include swamps, bogs, marshes, and similar areas." 33 C.F.R. § 328.3(b). As stated in the preamble to the 1977 regulations, this language was included to demonstrate the intent of the Corps to include "only truly aquatic areas." 42 *Fed. Reg.* 37,129 (1977).

Notably, the Corps' clarifying sentence of its "wetlands definition" does *not* state that wetlands generally include *corn fields, soybean fields,* and *vacant lots.* Thus, unless corn fields, soybean fields, and vacant lots are "similar areas" to "swamps, marshes, and bogs," 33 C.F.R § 328.3(b), regulatory jurisdiction cannot attach.

The rule of *ejusdem generis* demands that "where general words follow an enumeration of specific things, the general words are read as applying only to other items akin to those specifically enumerated." *Harrison v. P.P.G.*, 446 U.S. 578, 588 (1980).

The general words "similar areas" follow the more specific words "swamps, marshes, bogs" in the definition of wetlands contained in 33 C.F.R. § 328.3. Consequently, for land to be considered a "wetland," it must be the same type of area as a swamp, marsh, or bog. The Corps

and EPA, however, have recently attempted to discard this plain reading, and now interpret the phrase "similar areas" to mean "other areas" – including cultivated farm fields, dry lots, and other typically non-aquatic areas.

Why the new quest to regulate dry land? An environmental group's recent publication sheds light on the Corps' motive – bureaucratic self-preservation:

> For civil engineers in general, environmental projects offer a boundless future. For the Corps in particular they mean job security. The day of huge river basin projects has passed; with growing public resistance to such projects, and tightening budget constraints, the Corps could be relegated to custodian status. Environmental engineering offers the Corps steady work, an image pure and true – and an almost bottomless pork barrel.

Audubon Magazine, July, 1990, at 111. Thus, from the Corps own self-interest arose a new Manual for making jurisdictional determinations over supposed "wetlands."

2. NATIONWIDE REACTION TO THE CORPS/EPA'S DRY "LAND GRAB."

Concern over the Corps and EPA's wetlands regulatory expansion (and abuse) is growing nationwide, with good reason. The "Federal Manual for Identifying, and Delineating Jurisdictional Wetlands," which was published as a joint effort between the Corps, EPA, and two other agencies on January 10, 1989, sets forth "*mandatory*" technical criteria and methods for identifying and delineating jurisdictional wetlands. The new Manual and the expanding regulatory policies of the agencies have recently met with sharp criticism by Congress. For example:

> Unfortunately, the current direction of our wetlands policy is progressing in ways that were never envisioned by Congress. The changes that

> are being attempted do not follow congressional intent. Rules and regulations are being written by bureaucrats who believe they have long been stifled over at EPA during the past eight years, and now, giving them an inch, they are taking a mile.
>
> The Federal Manual for Identifying and Delineating Jurisdictional Wetlands, written from within the bowels of the Interior Department makes serious changes in our definition of wetlands. These changes were never proposed or discussed before a Committee of this Congress, nor were the changes proposed in the Federal Register. This new definition substantially impacts our nation, particularly rural areas, and enhances our government's "land grab" abilities.

Testimony of Congressman Emerson before the Subcommittee on Water Resources, Committee on Public Works and Transportation: "Wetlands Hearing," February 28, 1990.

Similarly, former President Bush, who announced the "no net loss of wetlands" policy which energized the Corps and EPA to draft the Manual in question, has stated the Executive Branch's concerns with the agencies' overregulation:

> We are trying to do a better job of getting these agencies to work together, but you have zealots in various levels of the bureaucracy. We will try very hard from the top on down to get the clarification that is needed to avoid this frustration among farmers. I am not happy with this. . . .

June/July, 1990, *Farm Journal*, p. 17.

B. THE PENCHANT FOR OVERREGULATION SIGNIFICANTLY IMPACTS THE REGULATED COMMUNITY.

The national significance of this case, and the nationwide magnitude of the problem faced by landowners, is heightened by the Corps/EPA attempt to leave behind their aquatic jurisdictional boundaries and come onto dry land. A revealing and alarming portrait of these agencies' view of their expanding jurisdiction is found in a fairly recent EPA publication which states: "If there's not a wetland in your neighborhood, there's probably one nearby." EPA: "America's Wetlands: Our Vital Link Between Land and Water," p. 1 (1988). Landowners across the nation have become outraged and adamantly disagree with the agencies' claims that their dry, solid-ground constitutes "navigable water" under the CWA, and that merely moving dirt (not "cellar dirt," 33 U.S.C. § 1362(6)) in a field, or on a dry lot, is considered a "discharge of a pollutant into water." Thus, Petitioners' statutory question presented, whether, as a matter of statutory interpretation, § 1362(6) of the CWA, which defines "pollutants" as certain materials "discharged into water," can be construed to mean the discharge of clean fill "near water" or "onto wetlands," is an important question for this Court to decide.

Significantly, many, if not most landowners (such as Petitioners) find themselves confronted with the agencies' jurisdictional claim only *after* they have already commenced work on what any reasonable person would view as a non-aquatic area. When the agencies assert jurisdiction and inform the landowner that he or she is a "violator" and a "water polluter" subject to the wide gambit of potential penalties and injunctive relief set forth in the CWA, *see* 33 U.S.C. § 1319, the landowner is placed in a precarious position indeed. He can capitulate, face an "enforcement action," or attempt to obtain judicial declaratory relief for an action which no reasonable man would have considered to be illegal. The agencies then typically

capitalize on their superior bargaining position and the extreme imbalance of economic and other resources to extort "mitigation" by offering the "carrot" of a § 404 permit, all the while "wielding the club" of enforcement, which includes the threat of imprisonment, fines, costly litigation and/or "restoration" – alternatives and risks the agencies know the unfortunate landowner can ill afford.

II. IN ENACTING THE CLEAN WATER ACT, CONGRESS DID NOT INTEND TO INCLUDE ALL AREAS THAT MEET THE REGULATORY WETLANDS DEFINITION WITHOUT REGARD TO THE EFFECT OF THEIR USE ON INTERSTATE COMMERCE.

Amici submit that the Third Circuit has oversimplified Commerce Clause principles and largely ignored the "effect on commerce" test to be used in determining whether a Commerce Clause nexus exists. *Amici* certainly do not deny that Congress has broad power under the Commerce Clause to affirmatively regulate activities which cumulatively have a significant effect on interstate or foreign commerce, even if a particular individual activity alone does not have a major effect. However, Congress, in enacting the CWA, never expressed an intent to dispense with the test that there is discretion to determine, on particular facts, whether the minimal Commerce Clause nexus has been met. Thus, Congress never explicitly exercised its Commerce Clause powers to regulate, as a class, all wetlands, however defined, as it has for other regulatory programs designed to control activities such as strip mining and loan sharking.

Given this lack of express legislative intent, the Third Circuit seriously departed from the teachings of this Court and the practice of its sister circuits by failing to analyze what effect, if any, on interstate commerce is caused by Petitioners' placement and maintenance of clean fill material on their private property. The Third

Circuit's alleged nexus to interstate commerce is not predicated upon any allegation by the government that the placement of clean fill on Petitioners' property hundreds of yards from a drainage stream *does* exert, or can reasonably be expected *to exert*, an effect on interstate commerce; rather, the nexus arises *solely* from the geographical and historical fact that Petitioners' property is adjacent to a drainage ditch or stream that is a *tributary* of a waterway that *was* used in interstate commerce in the 1800's.

It has generally been held that to fall within Article I, § 8, Cl. 3 (the "Commerce Clause" of the Constitution) an activity must satisfy either (1) the "in commerce" test or (2) the "effect on commerce" test. The "in commerce" test requires that the subject activity be part of one or more interstate transactions, or that the activity be "an integral part of the transaction, inseparable from the interstate aspects." *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (title examination held an integral part of the interstate residential real estate financing market); *Construction Aggregate Transport, Inc. v. Fla. Rock Industries, Inc.*, 710 F.2d 752, 766-67 (11th Cir. 1983) (when antitrust plaintiff and defendant engaged in purely intrastate business, "it [was] clear that 'in commerce' or 'flow of commerce' theory of jurisdiction [was] not available . . . ").

A. THE CLEAN WATER ACT DOES NOT REACH TO THE CONSTITUTIONAL LIMIT OF THE CONGRESSIONAL POWER TO REGULATE INTERSTATE COMMERCE.

Loose language in several lower court decisions assert that the CWA reaches as far as the Commerce Clause permits. Significantly, however, this Court in *Riverside Bayview* expressly declined the invitation to endorse these dicta. *Id.* at 135, 137, 138. After all, so long as a substantial effect on interstate commerce is shown, Congress may regulate the use of entirely dry land. *Hodel v. Virginia Surface Mining & Reclamation Association*, 452 U.S.

264, 275-277, 281-283 (1981). Yet no one suggests that the CWA permits the Corps or EPA regulate any *land* that is used in interstate commerce without regard to the presence of water. Nor is it arguable that the CWA embraces all *aquatic* sites with respect to which the Commerce Clause might authorize federal legislation. Thus, although the Civil Rights Act of 1964 reaches hotel swimming pools (*see* 42 U.S.C. § 2000a(b)(1), (b)(4), (c)), presumably no one claims that they are within the jurisdiction of the Corps or EPA under the CWA.

The upshot is that § 404 of the CWA, at most, reaches the non-navigable portions and significant non-navigable tributaries of waters actually or potentially navigable, together with their immediately adjacent wetlands. Accordingly, the Corps and EPA regulations at issue must be condemned as unauthorized insofar as they purport to regulate waters or wetlands which are not adjacent to a navigable water system on non-wetland areas above the line of mean high tides.

B. THE "EFFECT ON COMMERCE TEST" IS AN ESSENTIAL ELEMENT IN DETERMINING WHETHER AN ACTIVITY COMES WITHIN THE COMMERCE CLAUSE.

The "effect" test has been variously interpreted to require either (1) a "substantial effect" or (2) "not insubstantial" effect on interstate commerce. The leading Supreme Court case on this test, *McClain v. Real Estate Board of New Orleans, Ins.*, 444 U.S. 232, 241-245 (1980), seems to use the terms interchangeably, finding that an antitrust plaintiff had demonstrated that a certain real estate brokerage activity had a "substantial effect" on interstate commerce so as to fall within the reach of the Sherman Anti-Trust Act. *See also Del Rio Distributing Co., Inc. v. Adolph Coors Co.*, 589 F.2d 176 (5th Cir. 1979).

The "effects" test does not universally require that a particular defendant's unlawful activity "directly" affect commerce. Under proper circumstances, indirect effects

of the activity can be sufficient. Moreover, the effect of the alleged injury may be examined in the context of "cumulative" damage from the universe of similar activities. *United States v. Women's Sportswear Assn.*, 336 U.S. 460, 464 (1949).

The "effects" test was articulated by this Court in *Hodel v. Virginia Surface Mining and Reclamation Assn.*, 452 U.S. 264, 282 (1981). In *Hodel*, this Court upheld the constitutionality of the Surface Mining Control and Reclamation Act of 1977, holding that the Commerce Clause allows congressional regulation of "activities causing air and water pollution, or other environmental hazards that may have effects in more than one state." The *Hodel* Court also rejected petitioners' argument that the subject of the Act was "land use," which was primarily a local activity. To this Court, the commodity at issue – coal – moves in interstate commerce. Therefore, this Court relied on the long-standing rule that "Congress may regulate the conditions under which goods shipped in interstate commerce are produced where the local activity of producing these goods itself affects interstate commerce." *Id.* (citations omitted.) However, this Court still emphasized:

> [s]ome activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have some nexus with interstate commerce. Our cases have consistently held that the regulated activity must have a *substantial* effect on interstate commerce.

452 U.S. at 311 (emphasis added.)

These principles have been especially applied in construing the constitutional reach of the CWA. *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985). In enacting the CWA, Congress still required the executive branch to determine if the requisite maximum nexus to interstate commerce exists in specific cases.

C. CONGRESS NEVER EXPLICITLY REQUIRED THE REGULATION OF ALL ACTIVITIES THAT IN ANY WAY AFFECT *ANY* AREAS CONTAINING WETLANDS MEETING THE CORPS' AND EPA'S REGULATORY DEFINITION.

The Third Circuit erred in rejecting Petitioners' claim that the government failed to show how Petitioners' property affects any interstate commerce, stating that such jurisdiction was "irrebuttally presumed" by the Corps' regulations. Petitioners' App. at 21a. The court also erroneously relied upon a line of cases which suggest that Congress' Commerce Clause power is so broad in scope that no activity can have too small an impact to escape its reach. However, there is a key distinguishing feature to this line of Commerce Clause cases – they address situations where Congress had explicitly found that a particular activity or activities, as a class, affect interstate commerce and must be regulated as a class in order to achieve specific legislative goals. In contrast, Congress has never made such an explicit finding with respect to all areas which contain wetlands meeting the Corps' and EPA's regulatory definition.

For example, in *United States v. Darby*, 312 U.S. 100 (1941), this Court upheld an Act of Congress which prohibited the employment of workers in the production of goods for interstate commerce at other than prescribed wages and hours. This Court found that Congress had prescribed a "class of activities" to be regulated which was properly within Congress' Commerce Clause power without proof that the particular intrastate activity had an effect on commerce. A unanimous Court stated:

> Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on commerce, as in the Sherman Act. *It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited*

> *have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act.* And sometimes Congress itself had said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

312 U.S. at 120-121 (emphasis added).

Similarly, in *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 247 (1964), this Court upheld the constitutionality of the 1964 Civil Rights Act which declared that "any inn, hotel, motel, or other establishment which provides lodging to transient guest affects commerce *per se*" as affirmatively regulating a class of activities in order to protect individual civil rights. In a companion case, *Katzenbach v. McClung*, 379 U.S. 294, 298 (1964), this Court upheld the constitutionality of the restaurant provision of the same Civil Rights Act which regulated the restaurant "if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." In *Perez v. United States*, 402 U.S. 146 (1971), this Court held that Congress in enacting the Consumer Credit Protection Act of 1964, 82 Stat. 159, 18 U.S.C. § 891, especially determined that "extortionate credit activities" as defined by Congress, affect interstate commerce. Therefore,

> Congress appropriately considered the 'total incidence' of the practice on commerce [and]
>
> Where the class of activities is regulated and that class is within the reach of federal

> power, the courts have no power to 'excise as trivial individual instances' of the class.

402 U.S. at 151 (citation omitted).

Further, even where the object of federal regulations is environmental protection, the courts have looked for congressional intent to exercise its plenary Commerce Clause power to regulate all incidents of a class of activities. In *Hodel v. Virginia Surface Mining & Reclamation Association*, the Court held that Congress had determined that surface mining activities as a class, create adverse environmental effects on interstate commerce and therefore are a proper subject for congressional regulation. In so doing, this Court cited the

> [C]ongressional finding that nationwide "surface mining and reclamation standards are essential in order to insure that competition in interstate commerce among sellers of coal produced in different States will not be used to undermine the ability of the several States to improve and maintain adequate standards on coal mining operations within their borders." 30 U.S.C. § 1201(g).

452 U.S. at 281-282.

In contrast, the CWA is an example of where, in the words of *Darby, supra*, Congress "left it to the administrative board or agency to determine whether the activities sought to be regulated or prohibited have the [required] effect" on interstate commerce. *Darby*, 312 U.S. at 120. In particular, Congress has never identified wetlands as a class that automatically requires protection in all cases, even in the admittedly rare instance of a purely isolated waterbody which may have some incidental wetlands vegetation but has no identifiable use with an effect on commerce. Rather, Congress nowhere defined the term "wetlands" or its exact relationship to "waters of the United States." Instead, it left that definition and its application to the judgment of the executive branch. In fact, while the legislative scheme set up in the CWA "to

restore and maintain the chemical, physical and biological integrity of the Nation's waters," CWA § 101, 33 U.S.C. § 1251, was intended to expand federal regulation beyond the reach of traditionally navigable waters, Congress did not automatically include every waterbody, however isolated, within the coverage of the Act. As this Court noted in *United States v. Riverside Bayview Homes*:

> In keeping with these views, Congress chose to define the waters covered by the Act broadly. Although the Act prohibits discharges into "navigable waters," [citations omitted], the Act's definition of "navigable waters" as "the waters of the United States" makes it clear that the term "navigable" as used in the Act is of limited import. In adopting this definition of "navigable waters," Congress evidently intended to repudiate limits that had been placed on federal regulation by earlier water pollution control statutes and to exercise its powers under the Commerce Clause to regulate *at least some waters that would not be deemed "navigable" under the classical understanding of that term*. See S. Conf. Rep. No. 92-1236, p. 144 (1972); 118 Cong. Rec. 33756-33757 (1972) (statement of Rep. Dingell).

474 U.S. at 133 (emphasis added).

Thus, this Court's *Riverside Bayview* decision does not remotely suggest that the CWA embraces non-navigable waterbodies that are not connected to any navigable water system, much less isolated wetlands, wetlands above the headwaters, or temporarily ponded rainwater. This Court pointedly did not endorse the Government's suggestion that the 1977 reconsideration of the statute should be taken as proof that § 404, as enacted in 1972, was intended to authorize the full sweep of the Corps' regulations, including the provision that reaches "isolated" waters and wetlands.

CONCLUSION

For the foregoing reasons, a *writ* of *certiorari* should be issued to review the decision of the Third Circuit Court of Appeals. The insidious assault which that decision permits against our constitutionally protected federal form of government must be turned back.

Respectfully submitted,

PAUL M. SEBY
WILLIAM PERRY PENDLEY*
(*Counsel of Record)
MOUNTAIN STATES LEGAL FOUNDATION
1660 Lincoln Street, Suite 2300
Denver, Colorado 80264
(303) 861-0244

Attorneys for Amici Curiae

January 10, 1994